



**[Billing Code: 6750-01S]**

## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 310**

#### **Telemarketing Sales Rule**

**AGENCY:** Federal Trade Commission.

**ACTION:** Rule Review, Request for public comments.

**SUMMARY:** The Commission requests public comment on its Telemarketing Sales Rule (“TSR” or “Rule”). The Commission is soliciting comments as part of the FTC’s systematic review of all current Commission regulations and guides.

**DATES:** Comments must be received on or before October 14, 2014.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No. R411001,” on your comment and file your comment online at

<https://ftcpublic.commentworks.com/ftc/telemarketingsalesnprm> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Karen S. Hobbs or Craig Tregillus, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, (202) 326-3587 or (202) 326-2970.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Enacted in 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “Act”)<sup>1</sup> targets deceptive and abusive telemarketing practices.<sup>2</sup> The Act specifically directed the Commission to issue a rule defining and prohibiting deceptive and abusive telemarketing acts or practices.<sup>3</sup> In addition, the Act mandated that the rule address some specified practices, which the Act designated as “abusive.”<sup>4</sup> The Act also authorized state attorneys general or other appropriate state officials, as well as private persons who meet its jurisdictional requirements, to bring civil actions in federal district court.<sup>5</sup>

#### **A. Telemarketing Sales Rule**

Pursuant to the Act’s directive, the Commission promulgated the original TSR in 1995 and subsequently amended it in 2003 and again in 2008 and 2010 to add, among other things, provisions establishing the National Do Not Call Registry and addressing debt relief offers and prerecorded messages.<sup>6</sup> The TSR applies to “telemarketing,” defined to mean “a plan, program,

---

<sup>1</sup> 15 U.S.C. 6101-6108. Subsequently, the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act’s definition of “telemarketing” to encompass calls soliciting charitable contributions, donations, or gifts of money or any other thing of value.

<sup>2</sup> Other statutes enacted by Congress to address telemarketing fraud during the early 1990’s include the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. 227 *et seq.*, which restricts the use of automated dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission (“FCC”) to explore ways to protect residential telephone subscribers’ privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

<sup>3</sup> 15 U.S.C. 6102(a).

<sup>4</sup> 15 U.S.C. 6102(a)(3).

<sup>5</sup> 15 U.S.C. 6103, 6104.

<sup>6</sup> TSR and Statement of Basis and Purpose and Final Rule (“*TSR Final Rule*”), 60 FR 43842 (Aug. 23, 1995); Amended TSR and Statement of Basis and Purpose (“*TSR Amended Rule*”), 68

or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.”<sup>7</sup> The Telemarketing Act, however, in authorizing the issuance of the TSR, limited the jurisdiction of the Commission to its jurisdiction under Section 5 of the Federal Trade Commission Act (“FTC Act”). As a result, some entities and activities fall outside the scope of the TSR.<sup>8</sup> In addition, the Rule wholly or partially exempts several types of calls from its coverage. For example, the Rule generally exempts inbound calls placed by consumers in response to direct mail or general media advertising,<sup>9</sup> business-to-business calls,<sup>10</sup> and other situations.<sup>11</sup>

---

FR 4580 (Jan. 29, 2003); Amended TSR and Statement of Basis and Purpose (“*TSR Amended Rule 2008*”), 73 FR 51164 (Aug. 29, 2008); Amended TSR and Statement of Basis and Purpose (“*TSR Amended Rule 2010*”), 75 FR 48459 (Aug. 10, 2010).

<sup>7</sup> 16 CFR 310.2(dd) (adopting the definition used by the Telemarketing Act, 15 U.S.C. 6106(4)). The TSR excludes from the definition of telemarketing the solicitation of catalog sales that make specified disclosures in the catalog.

<sup>8</sup> See 15 U.S.C. 44, 45(a)(2) (which excludes from the Commission’s jurisdiction several types of entities, including bona fide nonprofits, bank entities (including, among others, banks, thrifts, and federally chartered credit unions), and activities of common carriers. In addition, activities related to the business of insurance are outside the FTC’s jurisdiction pursuant to the McCarran-Ferguson Act of 1945. 15 U.S.C. 1011-1015. However, the FCC’s rules, established pursuant to the TCPA, 47 U.S.C. 227, include similar “do not call” protections. 47 CFR 64.1200 *et seq.* The TCPA does not similarly limit FCC jurisdiction, but expressly excludes tax-exempt nonprofits from some requirements. 47 U.S.C. 227(a)(4)(C).

<sup>9</sup> 16 CFR 310.6(b)(5)-(6). The general exemption does not apply to certain limited situations. For example, the TSR covers calls initiated by a customer in response to a general advertisement relating to investment opportunities. See *id.*

<sup>10</sup> 16 CFR 310.6(b)(7) (exempting “[t]elephone calls between a telemarketer and any business, except calls to induce the retail sale of non-durable office or cleaning supplies”). The exemption, however, is limited to instances in which a telemarketer solicits a business regarding purchases on behalf of the business. Telemarketers and sellers are not exempted from the requirements of the TSR when they solicit consumers at their place of employment. *FTC v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1220-21 (D. Nev. 2010) (granting summary judgment on FTC’s TSR claims against defendant that placed telephone calls to businesses to sell magazine subscriptions to consumers employed at that business).

<sup>11</sup> 16 CFR 310.6 lists the exemptions from the TSR.

The TSR is designed to protect consumers in a number of ways. First, the Rule requires telemarketers to make certain disclosures and prohibits material misrepresentations to consumers.<sup>12</sup> Second, the TSR sets forth mechanisms to protect consumers from unauthorized charges or debits to their financial account, such as the requirement that telemarketers obtain the consumer's "express informed consent" for a charge to be billed to a particular account before billing or collecting payment.<sup>13</sup> Third, the Rule prohibits telemarketers and sellers from requesting or receiving advance payments for certain products and services. In particular, telemarketers and sellers may not charge advance fees for credit repair services;<sup>14</sup> recovery services;<sup>15</sup> loans or other extension of credit;<sup>16</sup> or debt relief services.<sup>17</sup> Fourth, the Rule

---

<sup>12</sup> The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information in an outbound telephone call or an internal or external upsell: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.4(d); *see also* 16 CFR 310.2(ee) (defining "upselling"). Telemarketers also must disclose in any telephone sales call the cost of the goods or services and certain other material information. 16 CFR 310.3(a)(1). In addition, the TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making false or misleading statements to induce any person to pay for goods or services or to induce charitable contributions. 16 CFR 310.3(a)(4).

<sup>13</sup> 16 CFR 310.4(a)(7); 16 CFR 310.3(a)(3).

<sup>14</sup> 16 CFR 310.4(a)(2).

<sup>15</sup> 16 CFR 310.4(a)(3). As the Commission has previously explained,

[In] recovery room scams . . . a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous scam. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.

*TSR Final Rule*, 60 FR at 43854.

<sup>16</sup> 16 CFR 310.4(a)(4) (focusing on loans that the telemarketer or seller represents to be guaranteed or highly likely to materialize); *see also TSR Amended Rule*, 68 FR at 4614 (finding

prohibits credit card laundering<sup>18</sup> and more broadly, assisting and facilitating sellers or telemarketers engaged in violating the TSR.<sup>19</sup> Fifth, the TSR, with narrow exceptions, prohibits telemarketers from calling consumers whose numbers are on the National Do Not Call Registry or who have specifically requested not to receive calls from a particular entity.<sup>20</sup> Finally, the TSR requires that telemarketers transmit to consumers' telephones accurate Caller ID information<sup>21</sup> and places restrictions on calls made using predictive dialers<sup>22</sup> and those delivering prerecorded messages.<sup>23</sup>

## **B. TSR Rule Review**

The Commission routinely reviews all of its rules and guides periodically to examine their efficacy, costs, and benefits, and to determine whether to retain, modify, or rescind them. The Commission does so in two ways. First, since 1992, the FTC has conducted a regular, systematic review of all its rules and guides on a rotating basis. Last year, the Commission announced its intention to seek public comment on several rules, including the TSR.<sup>24</sup> This notice commences the Commission's periodic review of the TSR.<sup>25</sup>

---

that credit repair services, recovery services, and loans and other extension of credit services were “fundamentally bogus”).

<sup>17</sup> 16 CFR 310.4(a)(5)(i); *see also* *TSR Amended Rule 2010*, 75 FR at 48458 (adopting TSR amendments to curb deceptive and abusive practices in the telemarketing of debt relief services).

<sup>18</sup> 16 CFR 310.3(c).

<sup>19</sup> 16 CFR 310.3(b).

<sup>20</sup> 16 CFR 310.4(b)(iii).

<sup>21</sup> 16 CFR 310.4(a)(8).

<sup>22</sup> 16 CFR 310.4(b)(1)(iv) (a call abandonment safe harbor is found at 16 CFR 310.4(b)(4)).

<sup>23</sup> 16 CFR 310.4(b)(1)(v).

<sup>24</sup> Notice of Intent To Request Public Comments, 78 FR 30798 (May 23, 2013).

<sup>25</sup> As required by the Telemarketing Act, 15 U.S.C. 6108, the Commission initiated a review of the Rule on November 24, 1999, which culminated in the TSR amendments adopted in 2003 that created the National Do Not Call Registry. *See* generally *TSR Amended Rule*, 68 FR 4580; *see also* Notice of Proposed Rulemaking (“2002 NPRM”), 67 FR 4492 (Jan. 30, 2002).

Second, the Commission may itself identify changes in the marketplace and other issues that warrant a proposal to amend the Rule. For example, in 2008<sup>26</sup> and 2010,<sup>27</sup> the Commission finalized amendments related to prerecorded calls and debt settlement services. In 2013, the Commission published a Notice of Proposed Rulemaking (“TSR Anti-Fraud NPRM”) seeking public comment on proposed amendments aimed at curbing the abuse of certain payment methods in telemarketing and clarifying provisions of the Rule.<sup>28</sup> The TSR Anti-Fraud NPRM is proceeding concurrently with this rule review.

### **1. General Areas of Interest for FTC Review**

As part of its review, the Commission is seeking comment on a number of general issues, as outlined in the questions posed in Section II below, including the continuing need for the TSR and its economic impact, the effect of the Rule on deception in telemarketing, and the interaction of the Rule with other regulations. The Commission believes that this review is important to determine whether the TSR continues to serve a useful purpose, and if so, how it could or should be improved.

---

<sup>26</sup> See generally *2008 TSR Amendments*, 73 FR 51164 (addressing the use of prerecorded messages).

<sup>27</sup> See generally *2010 TSR Amendments*, 75 FR 48459 (prohibiting the collection of advanced fees for debt relief services).

<sup>28</sup> Notice of Proposed Rulemaking (“*TSR Anti-Fraud NPRM*”), 78 FR 41200 (July 9, 2013). The proposed amendments would (1) bar sellers and telemarketers from accepting remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms as payment in inbound or outbound telemarketing transactions; (2) expand the scope of the advance fee ban on “recovery” services, now limited to recovery of losses in prior telemarketing transactions, to include recovery of losses in any previous transaction; and (3) clarify other TSR provisions. The Commission has not yet completed the rulemaking process or issued any further notice regarding these proposed amendments. The public comments are posted on the FTC’s website at <http://www.ftc.gov/os/comments/tsrantifraudnprm/index.shtm>.

## **2. Specific Areas of Interest for FTC Review**

The Commission occasionally receives informal input regarding the efficacy of the Rule and requests for clarification about the Rule's application. In addition, the Commission recognizes there may have been changes in the marketplace and legal landscape since the rule review that culminated in the 2003 amendments and since the 2008 and 2010 amendments. Some of the questions included in this notice, therefore, address specific issues. By including a summary of some of these changes and related issues, the Commission intends to facilitate comment, and the inclusion or exclusion of any issue is not an indication of the Commission's intent to make any specific modifications to the Rule.

### **a. Preacquired Account Information**

Preacquired account information is any information that enables a seller or telemarketer to cause a charge to be placed against a consumer's account without obtaining the account number directly from the consumer.<sup>29</sup> Consumers who provide their financial account information to a seller to complete a purchase during a telemarketing call can be surprised to find that a different seller has charged their account for additional purchases arising from the same call or a subsequent call.

Since the Commission amended the TSR in 2003 to address the use of preacquired account information in telemarketing,<sup>30</sup> significant changes in the legal landscape have occurred,

---

<sup>29</sup> 16 CFR 310.2(x).

<sup>30</sup> Among other things, the 2003 amendments added provisions to section 310.4(a) to protect consumers from unauthorized charges resulting from the use of preacquired account information. Section 310.4(a)(6) makes it illegal to traffic in unencrypted consumer account numbers. Section 310.4(a)(7)(i) requires telemarketers using preacquired account information in combination with so-called free trial offers to obtain additional evidence of a consumer's express informed consent to be charged. This evidence includes an audio recording of the entire

namely, the passage of the Restore Online Shoppers Confidence Act (“ROSCA”), 15 U.S.C. 8401 (2010), and the promulgation of certain credit card operating rules as discussed below. In 2009, the Senate Committee on Commerce, Science, and Transportation (“Senate Commerce Committee”) launched an investigation into the use of “data pass,” an online marketing practice involving preacquired account information.<sup>31</sup> Data pass usually involves a consumer shopping at a familiar online website. At the retailer’s checkout, after the consumer already has entered his credit card information, a third-party marketer displays an offer for a discount or reward that the consumer accepts. Many consumers do not know the offer is from a third-party seller or that there are any fees or costs associated with the offer. These consumers end up with unexpected monthly membership fees or other recurring charges because, unbeknownst to the consumer, the first retailer has passed the consumer’s credit card information to the third-party seller. Frequently, consumers do not realize they have been charged until unfamiliar transactions appear on a monthly statement.

Ultimately, Congress found that “[t]he use of a ‘data pass’ process defied consumers’ expectations that they could only be charged for a good or a service if they submitted their

---

telemarketing call and the receipt (from the consumer) of the last four digits of the account to be charged.

<sup>31</sup> *Aggressive Sales Tactics on the Internet and Their Impact on American Consumers*, Hearing Before the S. Comm. on Commerce, Sci. & Transp., 111<sup>th</sup> Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg54917/pdf/CHRG-111shrg54917.pdf>; OFFICE OF OVERSIGHT & INVESTIGATIONS MAJORITY STAFF, S. COMM. ON COMMERCE, SCI. & TRANSP., 111<sup>TH</sup> CONG., SUPPLEMENTAL REPORT ON AGGRESSIVE SALES TACTICS ON THE INTERNET, 17-18 (Comm. Print 2010), available at [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=439184c5-0965-4bb9-aa98-4a114b00a42e](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=439184c5-0965-4bb9-aa98-4a114b00a42e); OFFICE OF OVERSIGHT & INVESTIGATIONS MAJORITY STAFF, S. COMM. ON COMMERCE, SCI. & TRANSP., 111<sup>TH</sup> CONG., AGGRESSIVE SALES TACTICS ON THE INTERNET AND THEIR IMPACT ON AMERICAN CONSUMERS (Comm. Print 2009), available at [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a).



billing information, including their complete credit or debit card numbers.”<sup>32</sup> To curb the abusive use of preacquired account information in the online context, Congress enacted ROSCA, which prohibits an “initial merchant” from disclosing a consumer’s billing information to any “post-transaction third-party seller” for the purpose of charging the consumer’s account.<sup>33</sup> Under ROSCA, a third-party seller must obtain the consumer’s full account information directly from the consumer.

The operating rules of the three major credit card associations are consistent with ROSCA. They prohibit the disclosure, exchange, or use of preacquired credit card account information by and among their merchants.<sup>34</sup> Visa, MasterCard, and American Express operating rules forbid merchants from disclosing cardholder account information to third parties other than to facilitate the processing of sales transactions or as required by law.<sup>35</sup>

---

<sup>32</sup> 15 U.S.C. 8401(7).

<sup>33</sup> *Id.* The definition of “initial merchant” includes a subsidiary or corporate affiliate of the initial merchant.

<sup>34</sup> See, e.g., Visa International Operating Regulations, Chapter 8: Risk Management – Account and Transaction Information Security, *Cardholder and Transaction Information Disclosure Prohibitions (Updated)* p. 715 (Apr. 13, 2013), available at <http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf>; MasterCard Rules, *Rule 5.13 Sale or Exchange of Information*, p. 5-19 (June 14, 2013), available at [http://www.mastercard.com/us/merchant/pdf/BM-Entire\\_Manual\\_public.pdf](http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf); and American Express Merchant Reference Guide - U.S., *Rule 3.4 - Treatment of American Express Cardmember Information*, p. 18 (Oct. 2013), available at [https://www209.americanexpress.com/merchant/singlevoice/singlevoiceflash/USEng/pdf/files/MerchantPolicyPDFs/US\\_%20RefGuide.pdf](https://www209.americanexpress.com/merchant/singlevoice/singlevoiceflash/USEng/pdf/files/MerchantPolicyPDFs/US_%20RefGuide.pdf).

<sup>35</sup> See, e.g., Visa Business News, Risk Management Compliance, *Merchants May Not Share Cardholder Account Information with Third Parties* (Apr. 21, 2010) (“These new rules clarify that merchants forming marketing and/or referral arrangements with other merchants may not transfer cardholder information to their referral partners to complete subsequent transactions with the Visa cardholder. Alternatively, any subsequent transactions related to these marketing arrangements must be subjected to a separate and distinct check out process. This separate check out process must require the cardholder to provide an account number so there is clear recognition that a sales transaction will occur.”).

In contrast, the existing TSR expressly permits the use of preacquired account information by and among third parties, with certain restrictions.<sup>36</sup> The Commission invites public comment as to what effect, if any, these industry and regulatory changes should have on the TSR.

**b. Negative Option Marketing**

Negative option marketing refers to an offer or agreement to sell goods or services “under which the consumer’s silence or failure to take an affirmative action to reject the goods or services or to cancel the agreement within a specified period of time is interpreted by the seller as acceptance of the offer.”<sup>37</sup> In 2003, the Commission amended the TSR to require telemarketers and sellers to disclose the specific terms and conditions of such offers and to make truthful disclosures of all aspects of a negative option feature.<sup>38</sup> In addition, section 310.4(a)(7)(i) was added to protect consumers from unauthorized charges resulting when telemarketers use preacquired account information in combination with free-trial offers.<sup>39</sup> Since then, the marketplace and legal landscape have evolved.

For example, at the time the Commission adopted these protections for consumers, staff found “no evidence on the record indicating that these [negative option] products or services [were] telemarketed through general media advertisements.”<sup>40</sup> Today, telemarketers and sellers

---

<sup>36</sup> See *supra* note 28.

<sup>37</sup> 16 CFR 310.2(u).

<sup>38</sup> 16 CFR 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

<sup>39</sup> *2003 TSR Amendments*, 68 FR at 4658. Section 310.4(a)(6)(i) (now 310.4(a)(7)(i)) provides that, in telemarketing transactions involving a free-to-pay conversion and preacquired account information, evidence of a consumer’s express informed consent to be charged must include an audio recording of the entire telemarketing call and the telemarketer must obtain from the consumer the last four digits of the account to be charged.

<sup>40</sup> *2003 TSR Amendments*, 68 FR at 4658. The “general media” exemption itself dates back to the original Rule issued in 1995. The exceptions to the general media exemption reflect the

must abide by section 310.4(b) of the TSR, which generally prohibits outbound calls to telephone numbers registered on the national Do Not Call list,<sup>41</sup> restricts abandoned calls,<sup>42</sup> and bans the use of most prerecorded messages.<sup>43</sup> In the wake of these restrictions, telemarketers now use a variety of general media to solicit inbound calls from consumers to purchase a variety of goods and services,<sup>44</sup> including those involving a negative option or free-trial.<sup>45</sup>

---

Commission’s law enforcement experience with deceptive telemarketers’ use of mass media to advertise “certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls.” *Id.* As a result, inbound calls in response to general media advertisements for investment or business opportunities, advance fee loans, credit card protection services, credit repair services, recovery services and (since 2010) debt relief services are subject to the Rule.

<sup>41</sup> 16 CFR 310.4(b)(1)(iii).

<sup>42</sup> 16 CFR 310.4(b)(1)(iv).

<sup>43</sup> 16 CFR 310.4(b)(1)(v).

<sup>44</sup> Data from the Commission’s third Consumer Fraud Survey (“Third Fraud Survey”) issued in 2013, a decade after the implementation of the Do Not Call provisions of the TSR, suggest that more than half of all frauds are now mass-marketed via radio, television, newspapers, magazines, and additional kinds of general media advertising other than direct mail, including internet webpages and email. Keith B. Anderson, *Consumer Fraud in the United States: The Third FTC Survey* (April 2013), available at <http://www.ftc.gov/reports/consumer-fraud-united-states-2011-third-ftc-survey>. For example, the Third Fraud Survey showed that in 59.3 percent of fraud incidents, victims initially learned about the fraudulent offer through such general media advertising. *Id.* at 37-39.

<sup>45</sup> See, e.g., *FTC v. FTN Promotions, Inc.*, Civ. No. 8:07-1279 (M.D. Fla. Jan. 13, 2014) (\$14.75 million contempt judgment against defendants for violating a 2008 stipulated judgment by telemarketing a payday loan scam that provided only a negative option membership service); *FTC v. Ultralife Fitness, Inc.*, Civ. No. 2:08-07655 (C.D. Cal. Dec. 1, 2008) (Stip. Perm. Inj.) (defendants advertised free trial sale of weight loss dietary supplements via general media outlets, allegedly took consumers’ credit or debit card information to cover shipping and handling, and then charged consumers’ accounts for continuity programs without their consent); *FTC v. Hispanexo, Inc.*, Civ. No. 1:06-424 (E.D. Va. Apr. 18, 2006) (Stip. Perm. Inj.) (defendants allegedly used Spanish-language radio and television advertisements to lure consumers to pay \$9 shipping and handling charges for a 15-day trial of at-home instructional courses without disclosing that their credit card or bank accounts automatically would be charged three additional payments of \$86.99 at the conclusion of the trial period); see also *FTC v. Berkeley Premium Nutraceuticals, Inc.*, Civ. No. 1:06-00051 (S.D. Ohio July 22, 2009) (Stip. Perm. Inj.).

Furthermore, Congress, in enacting ROSCA, also highlighted the risk of deception when online merchants use data pass in combination with offers involving a “negative option feature.” ROSCA requires online marketers to clearly and conspicuously disclose all material terms of any offer involving a negative option feature before obtaining the consumer’s billing information; obtain a consumer’s express informed consent to be charged for such goods or services; and provide a simple mechanism for a consumer to stop recurring charges resulting from the transaction.<sup>46</sup> ROSCA incorporates the TSR’s definition of “negative option feature” and generally mirrors the Rule’s provisions requiring pre-sale disclosures of material terms of a negative option offer<sup>47</sup> and prohibiting material misrepresentations of any material aspect of a negative option feature.<sup>48</sup> The Commission invites public comment as to what impact, if any, these marketplace changes should have on the TSR.

### **c. Recordkeeping**

The recordkeeping requirements in section 310.5 of the TSR do not include a requirement that sellers and telemarketers retain any record of the telemarketing calls they have placed. Neither the original TSR nor the 2003 amendments considered such a requirement,<sup>49</sup> evidently based on the reasonable assumption that records of telemarketing calls would be readily available from a seller’s or telemarketer’s telephone carrier. However, this assumption has been called into question.

Obtaining call records for a seller’s or telemarketer’s sales calls to consumers is necessary to enforce the prohibition against calls to numbers on the National Do Not Call

---

<sup>46</sup> 15 U.S.C. 8403.

<sup>47</sup> 16 CFR 310.3(a)(1)(vii).

<sup>48</sup> 16 CFR 310.3(2)(ix).

<sup>49</sup> Statement of Basis & Purpose, 60 FR 43842, 43857 (Aug. 23, 1995); Statement of Basis & Purpose, 68 FR 4580, 4653 (Jan. 29, 2003).

Registry. That task has turned out to be inefficient, difficult and time-consuming because it often requires multiple requests to different telecommunications service providers that do not always produce the most useful records. Moreover, when a telecommunications provider is located outside the U.S., enforcement is even more problematic.

The Commission recognizes that the simple solution to these enforcement obstacles – requiring sellers and telemarketers to retain their own call records – would likely create compliance costs and burdens, and therefore requests comments detailing the costs and burdens of such a requirement, as well as suggestions for feasible alternatives.

## **II. Issues for Comment**

Without limiting the scope of issues on which it is seeking comment, the Commission is particularly interested in receiving comments on the questions that follow. These questions are intended only as examples of the issues relevant to the Commission’s examination. Interested parties are invited to comment on any relevant issue, regardless of whether it is identified below. Where comments advocate changes to the Rule, please be specific in describing suggested changes and describe any potential costs and/or benefits such changes might have on industry and consumers. The Commission requests that responses to its questions include a reference to the question being answered, and cite to empirical data or other evidence wherever available and appropriate.

### **A. General Questions for Comment**

1. Is there a continuing need for all parts of the Rule? Why or why not?
  - a. Have changes in technology, industry structure, or economic conditions affected the need for or effectiveness of any parts of the Rule?

- b. Does the Rule include any provision that imposes costs not outweighed by benefits? If so, which ones?
  - c. Does the Rule include any provision that is no longer necessary? If so, which ones?
  - d. Does the Rule include any provision that fails to serve its intended purpose? If so, which ones?
  - e. Does the Rule include any provision imposing unnecessary costs and burdens on businesses, including small businesses?
  - f. What are the aggregate costs and benefits of the Rule?
  - g. Have the costs or benefits of the Rule dissipated over time?
2. What impact, if any, has the Rule had on consumers?
- a. What significant benefits has the Rule provided to consumers? What evidence supports the asserted benefits?
  - b. What economic or other costs or burdens has the Rule imposed on consumers? What evidence supports the asserted costs or burdens?
  - c. What impact has the Rule had on the flow of truthful information to consumers? On the flow of deceptive information to consumers?
  - d. What impact has the Rule had on consumer privacy?
  - e. What changes, if any, should be made to the Rule to increase the benefits to consumers? How would these changes affect the compliance costs or burdens the Rule imposes on businesses, including small businesses?
3. What impact, if any, has the Rule had on entities that must comply with it?

- a. What economic or other costs or burdens has the Rule imposed on the industry or individual sellers or telemarketers? What evidence supports the asserted costs or burdens?
  - b. How has the Rule benefitted the industry or individual sellers or telemarketers? What evidence supports the asserted benefits?
  - c. What changes, if any, should be made to the Rule to minimize any burden or cost imposed on the industry or individual businesses, including small businesses? How would these changes affect the benefits provided by the Rule to consumers or the industry?
  - d. What evidence is available concerning the degree of industry compliance with the Rule? Does this evidence indicate that the Rule should be modified? If so, why, and how? If not, why not?
4. What impact, if any, has the Rule had on sellers or telemarketers that are small businesses with respect to costs, profitability, and competitiveness? Have the costs or benefits of the Rule dissipated over time with respect to small business sellers or telemarketers?
  5. Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how do they overlap or conflict? What evidence supports any such asserted overlap or conflict. If overlaps or conflicts exist, how do telemarketers address them? Should the Rule be modified to address these asserted overlaps or conflicts? If so, why, and how? If not, why not?
    - a. To what extent have private parties and state attorneys general brought actions under the TSR? Under state telemarketing statutes or regulations?

- b. Are there any gaps where no federal, state, or local government law or regulation has addressed a particular abuse?
- 6. Are there regulatory alternatives to the Rule or any of its provisions that might reduce any adverse economic effect of the Rule, yet comply with the mandate of the Telemarketing Act to provide consumers with necessary protection from telemarketing deception and abuse?

## **B. Questions on Specific Issues**

### *Abusive Acts or Practices*

- 7. Section 310.4(a)(6) prohibits sellers and telemarketers from disclosing or receiving unencrypted consumer account numbers for use in telemarketing except for the purpose of processing a payment for goods or services or a charitable contribution.
  - a. Has this Rule provision been effective in preventing the use of preacquired account information for unauthorized billing of consumers' accounts? If so, why? If not, why not, and how has the prohibition been inadequate?
  - b. What changes, if any, should be made to this section? Explain. What are the costs and benefits of the change for consumers and for businesses, including small businesses?
  - c. Have the provisions of this section significantly increased the cost of doing business? If so, how? What changes could be made to the Rule to reduce the cost of these provisions for businesses, including small businesses, without negatively impacting consumers?



- d. Should the Rule prohibit all transfers of account information from one seller or telemarketer to another in telemarketing transactions? Why or why not?
  - i. In what situations do sellers or telemarketers transfer encrypted account information from one seller or telemarketer to another? How would transactions that use such transferred data be affected if they were no longer permitted to transfer encrypted account information?
  - ii. Would there be benefits in prohibiting such transfers and thereby making the Rule more consistent with the credit card associations' rules prohibiting the exchange, transfer, or sale of cardholder account numbers?
  - iii. What would be the costs and benefits of a total prohibition on the transfer of account information for consumers and businesses, including small businesses?
- e. Should sellers or telemarketers who obtain consumers' account information during a telemarketing transaction and wish to retain it for use in future transactions be required to obtain the consumer's consent? Is there any material difference between telemarketing sales and Internet sales that should prevent modification of the Rule expressly to require sellers and telemarketers to seek authorization to retain a customer's billing information for use in future transactions? If so, what is the difference and why should it prevent such a modification?
  - i. Do sellers and telemarketers currently retain consumer account information that they obtain in telemarketing transactions? If so, do

sellers and telemarketers obtain consumer permission before retaining the account numbers, and how is this permission obtained and in what circumstances is it sought? If not, what would be the costs of obtaining permission?

- ii. What would be the benefits of requiring sellers and telemarketers to obtain consumer consent before retaining account information that they receive as part of a telemarketing transaction? What problems have arisen where sellers and telemarketers have retained consumers' account information without their permission?
- iii. What evidence of the consumer's agreement, if any, should a seller or telemarketer be required to retain?
- iv. Should a consumer have the right to change or revoke her permission for a seller or telemarketer to retain her billing information at any time?
- v. Should any requirement for consumer consent to retain her billing information apply not only to outbound telemarketing calls, but also to:
  - 1. All inbound calls?
  - 2. Only inbound calls in response to general media or direct mail advertisements soliciting inbound calls?
- vi. What specific costs and burdens, if any, would a requirement to obtain a consumer's consent to retain her billing information for future transactions with the same seller or telemarketer impose on businesses, including small businesses?

- vii. Should any consent requirement for retaining a consumer's billing information apply only prospectively and "grandfather in" previously obtained billing information?
- 8. Section 310.4(a)(7) generally prohibits sellers and telemarketers from submitting billing information for payment in any transaction without first obtaining the express informed consent of the customer or donor to be charged for the goods or services or charitable donation and to be charged using an identified account.
  - a. Has this Rule provision been effective in preventing the use of preacquired account information for unauthorized billing of consumers' accounts? If so, why? If not, why not, and how has the prohibition been inadequate?
  - b. What changes, if any, should be made to this section? What would be the costs and benefits of any such change for consumers and businesses, including small businesses. Explain.
  - c. Should this section, permitting the use of preacquired account information by sellers and telemarketers who obtain a consumer's express informed consent, be made more consistent with (including more or less rigorous than) the credit card associations' rules prohibiting the exchange, transfer, or sale of cardholder account numbers? Why or why not?
  - d. Should this section be made more consistent with (including more or less rigorous than) section 3(a)(2) of the Restore Online Shoppers' Confidence Act? Why or why not?
  - e. Have the provisions of this section significantly increased the cost of doing business? If so, how? What changes could be made to the Rule to reduce

the cost of these provisions? What would be the costs and benefits of any such change for consumers and businesses, including small businesses?

Explain.

- f. What additional evidence, if any, of a consumer's express informed consent to be charged should the Rule require where a seller or telemarketer already has the consumer's account information and:
  - i. The charge is for an internal upsell by the seller or telemarketer who obtained the account information directly from the consumer in the same telephone call?
  - ii. The charge is for an external upsell by a seller or telemarketer who did not obtain the account information directly from the consumer?
  - iii. The charge is for a free trial offer that will lead to continuing charges if the consumer does not cancel?
  - iv. The charge is for an initial payment for a negative option or continuity sales plan?
  - v. The charge is for a subscription that will renew automatically?
- g. Are there benefits to the use of preacquired account information in (i) internal upsells, (ii) external upsells, (iii) free trial offers, (iv) negative option or continuity sales plans, and (v) subscription renewals? If so, please identify the benefits and quantify them if possible. Do these benefits outweigh the possible harm caused by the use of preacquired account information in these types of transactions? If so, please identify the harm and quantify it if possible.

9. Section 310.4(a)(7) specifically requires in a transaction involving preacquired account information and a “free to pay conversion feature” that a seller or telemarketer evidence a customer’s express informed consent by obtaining from the consumer the last four digits of the account number to be charged and making and maintaining an audio recording of the entire telemarketing transaction. (A “free to pay conversion feature” is a free trial for a specified period of time that requires payment if the customer does not take affirmative action to cancel the transaction before the free trial ends.)
- a. Has the requirement that the entire telemarketing transaction be recorded by sellers or telemarketers who use preacquired account information to bill consumers for offers with a free to pay conversion feature been effective in preventing or resolving billing disputes? If so, why? If not, why not, and how has the requirement been inadequate?
  - b. Has the requirement of obtaining the last four digits of the customer’s account number been sufficient to inform consumers that the seller or telemarketer has their account information and can use that information to place charges on their account? If so, why? If not, why not, and how has the prohibition been inadequate?
  - c. What changes, if any, should be made to this section? What would be the costs and benefits of any such change for consumers and businesses, including small businesses? Explain.
  - d. Have the provisions of this section significantly increased business costs, including the costs for small businesses? If so, how? What changes could

be made to the Rule to reduce the cost of these provisions while minimizing any loss of benefits for consumers?

- e. Should this section, permitting the use of preacquired account information by telemarketers and sellers who obtain additional evidence of consumers' express informed consent, be made more consistent with (including more or less rigorous than) the credit card associations' rules prohibiting the exchange, transfer, or sale of cardholder account numbers? Why or why not?
- f. Should this section be made more consistent with (including more or less rigorous than) section 3(a)(2) of the Restore Online Shoppers' Confidence Act? Why or why not?
- g. When a seller or telemarketer already has a consumer's billing information, is the consumer more likely to understand that she is authorizing a charge if she must provide the complete number of her account to be charged, only the last four digits, or is simply asked for her express authorization to charge the transaction to her account in the following scenarios:
  - i. The charge is for an additional purchase during the same telephone call with a seller or telemarketer to whom the consumer has already provided her account number?
  - ii. The charge is for a new purchase during a telephone call subsequent to a prior telemarketing call in which the consumer had agreed to be charged for a purchase by providing her billing information?

iii. The charge is for an external upsell purchase from a sales agent

different from the sales agent to whom, during the same telephone call, the consumer previously provided her billing information for an initial purchase?

To what extent, if any, do the answers depend on whether the consumer has previously given her account information to the seller or telemarketer and agreed to allow the seller or telemarketer to retain that information for use in future transactions?

h. Should the Commission consider a prohibition on any use of preacquired account information in external upsells? If so, why? If not, why not, and what costs and burdens would such a requirement impose on businesses, including small businesses, and on consumers?

i. Is any harm caused by the use of preacquired account information in external upsells outweighed by countervailing benefits to consumers or competition? If so, please identify the harm and the countervailing benefits, and quantify the benefits if possible.

j. Should the Commission consider applying the requirements of this provision to transactions involving preacquired account information and offers with negative option features?

10. Have the existing recordkeeping provisions imposed costs and burdens on sellers and telemarketers? On the ability of law enforcement authorities to take action against sellers and telemarketers that violate Rule requirements? What changes, if any, should be made to the recordkeeping provisions? What are the costs and

benefits of any such change for consumers and businesses, including small businesses? Explain.

11. Should the recordkeeping provisions be expanded to include a requirement that sellers and/or telemarketers retain records of the telemarketing calls they have placed? What specific costs and burdens would such a requirement impose on businesses, including small businesses? What costs and burdens does the lack of such a requirement impose on law enforcement and on consumers? Are there alternatives to such a requirement that would reduce law enforcement costs and burdens while minimizing the costs and burdens on businesses?

#### *Exemptions*

12. Section 310.6 lists acts or practices that are exempt from the Rule, including pay-per-call-services and the sale of franchises and business opportunities already subject to Commission rules.
  - a. Have the exemptions been effective at minimizing the burden on businesses, including small businesses, while affording consumers sufficient protections under the Rule? If so, why? If not, why not, and how should this section be changed?
  - b. How should sales to home-based businesses be treated under the Rule? Should sales to home-based businesses be considered business-to-business sales? If so, how are telemarketers able to differentiate between a residential telephone number and a home-based-business telephone number? If not, why not?



- c. Is the exemption for “general media” advertising still appropriate? If not, why not, and how should this exemption be changed?
- d. Should the Rule require that consumers who place inbound calls to a seller or telemarketer in response to a general media advertisement for a negative option product or service receive the same disclosures required by section 310.3(a)(1)(vii) for outbound telemarketing calls ? Why or why not?
- e. Should telemarketers and sellers who receive inbound calls from consumers in response to a general media advertisement be subject to the same prohibition against misrepresenting any material aspect of a negative option feature as provided in section 310.3(a)(2)(ix) for outbound telemarketing calls? Why or why not?
- f. Are there additional business-to-business products or services that should not be exempted from the TSR (*e.g.*, website creation or other Internet-related services, business directories or other advertising services)? Explain.
- g. Are there additional exemptions that would be appropriate? Explain.

**C. Questions on the Past and Future of the Telemarketing Industry**

The Commission also is seeking comment on the telemarketing industry generally to develop an understanding of the history of telemarketing over the past ten years, as well as factors currently shaping and likely to continue to shape the industry. Without limiting the scope of issues on which public comment may be submitted, the Commission is particularly interested in receiving comments on the questions that follow.

### *Industry Background*

13. What is the dollar volume of goods and services that are sold through telemarketing today? Through outbound telemarketing? Through inbound telemarketing? How many people are employed in outbound telemarketing? In inbound telemarketing?
14. How have these figures changed since 2003?
15. How many U.S. firms sell their products domestically, either in whole or in part, through telemarketing? How many sell via outbound telemarketing? How many only receive calls placed by consumers? How have these numbers changed since 2003?
16. How many of these firms engage in telemarketing on their own behalf? How many employ others to engage in telemarketing for them? How have these numbers changed since 2003?
17. How many U.S. entities sell their products, either in whole or in part, internationally through telemarketing?
18. How many foreign entities sell their products, either in whole or in part, in the U.S. through telemarketing?
19. How has the market for selling goods or services internationally by telemarketing changed, if at all, over the past ten years?
20. How many outbound calls are made each year? How many inbound calls are received each year? How have these numbers changed over the past ten years?

21. In addition to sellers and telemarketers, as defined by the TSR, what other third-parties currently serve the industry? How have these parties changed over the past ten years?
22. How do the costs and benefits of selling through telemarketing – either through outbound calls or inbound calls – compare to the costs and benefits of other methods of marketing, e.g., selling online or in a “brick-and mortar” face-to-face setting?
23. What percentage of small businesses use telemarketing to make sales? What percentage of businesses providing telemarketing services are small businesses?

#### *Technology*

24. What technological innovations have been implemented by telemarketers over the past ten years, and what impact have these innovations had on:
  - a. The growth of the telemarketing industry?
  - b. The number of consumers a telemarketer can contact in a given time period?
  - c. The manner in which list brokers and others develop call lists?
  - d. The costs of selling through telemarketing?
  - e. The response and general attitude of consumers toward the industry?
25. What impact have these technological innovations had on consumers? How have consumers benefitted? How have they been harmed? Explain.
26. How have the following technological developments impacted telemarketing? How have they impacted consumers?
  - a. The use of computer databases of consumer information?
  - b. Predictive dialers?

- c. The integration of telephone and computer technology to permit, e.g.,  
broadcasting of prerecorded calls?
  - d. The availability of VoIP?
27. What technology is available to consumers to screen or deflect unwanted calls from telemarketers (e.g., answering machines, Caller ID, anonymous call rejection, privacy managers, call filtering systems)? Are interception technologies available and affordable? What impact are such innovations having on telemarketing or telemarketers? How will these technologies that intercept calls shape the future of telemarketing? What consumer habits or concerns (such as the concern about security if an unanswered call may make it appear that the house is empty) may reduce the willingness of consumers to rely on this technology?
28. How has the growth of the Internet as a marketing medium affected traditional telemarketing? What trends are likely over the next five to ten years?

*Self-Regulatory Efforts*

29. What steps, if any, have industry associations taken to self-regulate? What perceived problems have these steps sought to address? How effective have industry efforts at self-regulation been? Explain.
30. Are industry-sponsored ethical codes effective? How many companies engaged in telemarketing belong to industry associations sponsoring self-regulatory efforts, as compared to the total number of companies engaged in telemarketing? Is compliance with these codes measurable? If so, what do these measurements show?

31. Has the industry undertaken efforts to educate members and/or the public about telemarketing fraud? Describe any such efforts and discuss how effective they have been.

#### *Government Regulation*

32. Excluding the TSR, what steps, if any, have federal, state, and local governments taken to regulate telemarketing? What perceived problems have these steps sought to address? How effective have these regulatory efforts been? Explain.
33. What efforts have federal, state, and local governments taken to educate industry and/or the public about telemarketing fraud? Describe any such efforts and discuss how effective they have been. What problems have been encountered?

#### *Consumer Issues*

34. What are consumer perceptions of telemarketing today? How have they changed over the past ten years?
35. How much money do consumers lose as a result of telemarketing fraud each year? Has the amount of telemarketing fraud increased or decreased over the past ten years? How much has it changed?
36. Are consumers more aware of telemarketing fraud than in the past? Are consumers less susceptible to telemarketing fraud now than ten years ago? What are the most effective ways to educate the public about fraudulent telemarketing practices?
37. Are there particular groups of consumers that are especially susceptible to telemarketing fraud and has this changed over the past ten years?

38. How can consumers be given greater control over contacts by telemarketers?

How are they exercising control now and how has that evolved?

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 14, 2014. Write “Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No. R411001,” on your comment. Your comment, including your name and your state, will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone’s Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which is . . . privileged or confidential,” as discussed in section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure

explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>50</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at:

<https://ftcpublic.commentworks.com/ftc/telemarketingsalesnprm> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that website.

If you file your comment on paper, write “Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No. R411001” on your comment and on the envelope, and mail your comment to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission website at <http://www.ftc.gov> to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or

---

<sup>50</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

before October 14, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

By direction of the Commission.

Donald S. Clark,  
Secretary.

[FR Doc. 2014-18505 Filed 08/08/2014 at 8:45 am; Publication Date: 08/11/2014]